Supreme Court of the United States

OCTOBER TERM, 1951

No. 540

W. M. COX,

Appellant,

vs.

JAMES S. PETERS AND MRS. IRIS BLITCH

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR RE-HEARING

We beg and beseech the majority of this court to grant re-hearing and to reverse the Supreme Court of Georgia in *one* particular only: that court ruled that the fourteenth and fifteenth amendments do *not* protect primaries to nominate state officials; this court should rule emphatically that the fourteenth and fifteenth amendments *do* protect primaries to nominate state officials.

You do not need to say one word about the Georgia county unit system; if you will simply declare that all Georgia primary laws *must* conform to the federal constitution, the state court can then decide, for the first time,

whether the Georgia county unit system *does* conform to the federal constitution.

We respectfully suggest that the majority of this court, though not intending to do so, have delivered a deadly blow at the vitals of the very constitution they are sworn to uphold. To the people of Georgia, your unelaborated dismissal says coldly, "Do not look to the federal constitution for 'equal protection' because it does not give you *any protection at all.*"

We came to this court on appeal from a ruling of the Supreme Court of Georgia which flaunted the federal constitution in the most direct way imaginable, namely by holding that said constitution affords no protection whatever to voters in the Democratic primary to nominate a candidate for governor. The *only question* considered by the state court was whether the federal constitution affords protection of any kind. Despite the obvious substance of that question, and despite the fact that the Supreme Court of Georgia rested its opinion solely on the answer to that question, this court disposed of the whole, vital controversy in a single sentence by saying, "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question."

Frankly, we do not know what your one-sentence opinion means. The long line of federal primary cases, we had thought, made it clear that the fourteenth and fifteenth amendments to the federal constitution protect primaries held to nominate *both federal and state officials.* But in the case at bar, the majority stated without elaboration that no "substantial federal question" is involved in the ruling of the Supreme Court of Georgia that the fourteenth and fifteenth amendments did *not* protect a Georgia primary held to nominate a *state* official. Does your opinion mean, then, that the fourteenth and fifteenth amendments

do *not* protect primaries held merely to nominate *state* officials? That is certainly a position which opposing counsel took in their motion to dismiss. That is quite likely the position which legislatures and political parties throughout the land will take in their future legislation and regulation.

We invite the majority of this court to consider the monstrous consequences of such a development. While taking great pains to be circumspect as to federal officials, legislatures and political parties can and will set up different rules for nominating state officials; and in some states those rules will surely exclude Negroes as well as various other classes. This court would then be deluged with suits involving both simple and sophisticated schemes to disfranchise persons because of color and other irrelevant factors, *within the restricted realm of nominating state officials.* In such suits the defendants would say, and would repeat again and again, "But there is no substantial federal question here; don't you remember Cox vs. Peters?"

After much conflict and misunderstanding, we conceive that this court would find it imperative to say, "But in Cox vs. Peters we did not mean to say that the federal constitution affords no protection to primaries to nominate state officials."

If that is not your meaning, please say so now! We urge this court to grant re-hearing, and to reverse on the sole point that the federal constitution *does* protect *all* Georgia primaries. Such a ruling will save us all, legislature and party and citizen and counsel and court, untold inconvenience and confusion; it will also prevent much discrimination that will almost certainly otherwise occur.

We have said that this court need not decide the validity of the county unit system, or of any other system of apportionment, on this appeal. We repeat and emphasize that point! We simply urge that this court declare that the

county unit system *must* conform to the federal constitution; the state can and will thereupon decide whether the system *does* conform to the federal constitution.

Nevertheless, in order to place the importance of this case in perspective, and in order to make clear how ultimately the decision of this court has frustrated hundreds of thousands of Georgia citizens, we ask the majority of this court to reflect seriously on just what has been done by this opinion.

Here are the people of a great state who have twice in recent years shown their true feelings about the "county unit system": once in 1946 when Carmichael received by far the most popular votes for the Democratic nomination for governor, but *lost* the nomination on a county unit basis; again in 1950 when the people voted approximately 165,000 to 135,000 *against* extending the unit system to the state constitution (they beat the amendment without counting a single vote in Fulton County, largest in Georgia). The people do not like the system. But what can they do about it?

It is all very well to say, "Let the people vote repeal"; but "the people" cannot vote to repeal, or even to readjust, the system. *There is no way on earth by which the majority of the people of Georgia can ever get a chance to say whether they wish to readjust or repeal the county unit system.* The people can speak only through their political machinery, and every single part and parcel of that machinery is infected with the county unit system!

The machinery of legislation is not available, because the legislature that would enact a bill is apportioned on the same basis as the county unit system (and the governor who would review the bill is always elected after being nominated under the county unit system).

The machinery of constitutional amendment is not available, because only the legislature can propose such an amendment, and the legislature is apportioned on the same

basis as the county unit system. The legislature may let the people say whether they wish to extend, but never to readjust or repeal, the system.

This is literally a case where hundreds of thousands of citizens have no hope except from their courts. The people have long placed great confidence in their courts; and the courts have justified this confidence time and again by rising above the narrow confines of petty procedural technicalities, and by declaring anew with passion and sincerity the great first principles of human rights in a democracy. We submit, however, that a one-sentence, unelaborated, unqualified dismissal, in the cold terms of that in the case at bar, falls far short of the great decisions by which *this* court has heretofore justified the people in their hope and confidence.

Hundreds of thousands of Georgia citizens are in political chains; there are only two keys, one held by their jailers, and the other by their courts. Law clerks might say, with petty sophistication, "Let the people persuade their *jailers* to release them; this court will wash its hands of the controversy." Pontius Pilate said something very similar two millenia ago. We urge that great judges on a great court would have done and will do otherwise.

Respectfully submitted,

Morris Abram,
Hamilton Douglas, Jr.,
W. S. Allen,
Myer Goldberg,
John E. Griffin,
C. Baxter Jones, Jr.,
James A. Mackay,
David L. Mincey,
Raymond M. Reed,
Counsel for Appellant.

CERTIFICATE OF COUNSEL

I do hereby certify that I am of counsel for the appellant in the within and foregoing petition for re-hearing, and that it is presented in good faith and not for delay.

C. Baxter Jones, Jr.
Of Counsel for Appellant

ACKNOWLEDGMENT OF SERVICE

On behalf of appellees, James S. Peters and Mrs. Iris Blitch, acknowledgment is hereby made of service and receipt of a copy of the within and foregoing petition for re-hearing.

This 14th day of March, 1952.

B. D. Murphy,
Of Counsel for Appellees,
James S. Peters and Mrs. Iris Blitch.

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 540

W. M. COX

v.

JAMES E. PETERS AND MRS. IRIS BLITCH

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING

The United States joins appellant in requesting reconsideration of the Court's order of March 3, 1952, dismissing the appeal for want of a substantial federal question. The Government is concerned (a) that the Supreme Court of Georgia has made a patently erroneous ruling upon a question of federal law of general importance, namely, that the protections of the Fourteenth and Fifteenth Amendments of the Federal Constitution do not extend to the right of citizens of the United States to vote in a primary for the nomination of state officials; (b) that, resting its decision solely on that ground, the state court did

not reach and decide the merits of appellant's claim that the so-called county unit voting system violates rights secured to him by the Fourteenth and Fifteenth Amendments; and (c) that this Court's dismissal of the appeal leaves undisturbed the erroneous ruling of the Supreme Court of Georgia on the only federal question decided by it, and has the unfortunate and plainly unintended effect of preventing appellant from urging on remand that his federal constitutional claim, although non-justiciable and non-reviewable in federal courts because political questions are involved, may nevertheless be entertained and adjudicated in the courts of the state of Georgia.

Appellant in this case sought to obtain from the state courts of Georgia a determination that the county unit voting system, as applied to a primary for the nomination of a candidate for the office of Governor of the state, violates the Fourteenth and Fifteenth Amendments. The jurisdiction of the state courts of Georgia, unlike federal courts, is neither ousted nor impaired because political questions are involved. *Thompson* v. *Talmadge*, 201 Ga. 867. Hence, had the state courts given judgment in vindication of appellant's asserted constitutional claim, there would have been no conflict with the rule applied by this Court in *South* v. *Peters*, 339 U. S. 276, 277, and cases there cited, that such a claim raises questions which are essentially political in nature and

hence not justiciable by federal courts under Article III of the Constitution of the United States.

The broad considerations of policy underlying the "political questions" rule applied in the federal courts were stated in the opinion of Mr. Justice Frankfurter (in which Mr. Justice Reed and Mr. Justice Burton concurred) in *Colegrove* v. *Green*, 328 U. S. 549, a suit in a federal district court to restrain state officers from enforcing a state election law which allegedly involved inequities and discriminations offensive to the federal Constitution. Such a suit, the opinion pointed out (p. 553), "concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof."

On the other hand, state courts in enforcing rights derived from federal law are not bound, as a general proposition, by jurisdictional or procedural limitations applicable to similar proceedings in federal courts. *Minneapolis & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211; *Chambers* v. *Baltimore & Ohio R. R.*, 207 U. S. 142; cf. *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230. Accordingly, a state may be free to vest its courts with authority to entertain and adjudicate claims under the Fourteenth and Fifteenth Amendments involving questions of a political nature which could not, under the rule applied

in *South* v. *Peters*, *supra*, be decided or reviewed by federal courts.[1] A state court could thus prop-

[1] A state court should have no less authority to decide federal questions of a nonjusticiable political nature than to render equally nonreviewable advisory opinions on federal questions of a justiciable nonpolitical nature. In *Doremus* v. *Board of Education*, decided March 3, 1952, the Court said (slip opinion, p. 5): "We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such." The Court in the *Doremus* case did not vacate the judgment of the Supreme Court of New Jersey holding that the statute involved did not violate the federal Constitution; it merely dismissed the appeal. Consequently, that state court judgment, though not reviewable by this Court, establishes the law for New Jersey as to the application of the Fourteenth Amendment to the subject-matter of the controversy.

Cf. *Chandler* v. *Wise*, 307 U. S. 474, in which the Kentucky Court of Appeals had held that the resolution of the state legislature purporting to ratify the proposed Chief Labor Amendment was void. This Court held that after the Governor of the state forwarded the certification of the ratification of the amendment to the Secretary of State of the United States, "there was no longer a controversy susceptible of judicial determination." However, the Court ordered, not that the judgment of the state court be reversed for lack of jurisdiction, but that the writ of certiorari be dismissed. It expressly stated (p. 477) that "the state court had jurisdiction *in limine* * * *." Mr. Justice Black and Mr. Justice Douglas concurred separately in the dismissal of the writ, stating that they did "not believe that state or federal courts have any jurisdiction to interfere with the amending process." See also *Pacific Telephone Co.* v. *Oregon*, 223 U. S.

erly undertake to pass on the merits of federal constitutional claims such as appellant's, even

118, where a state court rejected on the merits a claim that a state law was in conflict with the "republican form of government" provision of the federal Constitution. In holding this claim nonjusticiable, this Court dismissed the writ of error for want of federal jurisdiction. It did not hold that there was a similar lack of jurisdiction in the state court.

Coleman v. *Miller*, 307 U. S. 433, also involved an attack on the validity of the process whereby the state of Kansas ratified the proposed Child Labor Amendment. The state supreme court entertained the suit but dismissed it on the merits. This Court, holding (p. 454) that the questions raised by the suit "are essentially political and not justiciable" and could be decided only by Congress, affirmed the judgment of the state court on that ground. There was no suggestion in the Court's opinion that the suit was improperly entertained by the state court. The separate opinion of Mr. Justice Frankfurter (concurred in by Justices Roberts, Black and Douglas), urging that the writ of certiorari be dismissed because petitioners, whatever their remedies might be in the state courts under state law, had no standing in this Court since the issues were political, stated (p. 462): "To whom and for what causes the courts of Kansas are open are matters for Kansas to determine. But Kansas can not define the contours of the authority of the federal courts, and more particularly of this Court." See also *Columbus & Greenville Ry.* v. *Miller*, 283 U. S. 96, 99, and cases there cited, holding that the question of standing "to assail in the courts of the State the constitutional validity of a state statute is a local question * * *."

Even if it be held that some provisions of the federal Constitution by their very nature can be enforced only by Congress or the President, and that no court, federal or state, has jurisdiction to enforce them, this should not apply to claims like appellant's which are derived from the Fourteenth and Fifteenth Amendments.

though a federal court could not. And it is this question which the Supreme Court of Georgia, in the view it took of the case, did not reach, and, we fear, cannot reach if this Court's order dismissing the appeal remains unmodified. It is respectfully suggested that the Court's order in its present form precludes appellant from tendering to the Supreme Court of Georgia this issue which only that court can finally decide, namely, whether under Georgia law the state courts can and should take jurisdiction to determine the validity under the federal Constitution of the county-unit system as applied to a primary to nominate a candidate for Governor.

The Supreme Court of Georgia did not reach that question because it chose to rest its decision solely on the ground that such a state primary is not entitled to the same constitutional protection as a state election—a ruling of federal law which is plainly at variance with the decisions of this Court in *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73; *United States* v. *Classic*, 313 U. S. 299; and *Smith* v. *Allwright*, 321 U. S. 649. We do not construe the Court's dismissal of the appeal as implicitly approving this ground of the state court's decision. Fearing, however, that the order may in some quarters be interpreted as conveying such an implication, appellant in his petition for rehearing justifiably urges the Court to remove any doubts which may inadvertently

have been cast upon the authority of the line of cases cited above.

Since the order was not accompanied by a statement of the reasons therefor or a citation of supporting authorities, speculation as to the grounds for the Court's action cannot be avoided. It would appear, however, that the dismissal of the appeal rests upon an application of the rule applied in *South* v. *Peters, supra,* as to the non-justiciable character, so far as federal courts are concerned, of the political questions involved in the suit. Ordinarily, of course, the Court limits its review solely to a consideration of the precise federal question decided by the state court. *Whitney* v. *California,* 274 U. S. 357, 362–363; *Dewey* v. *Des Moines,* 173 U. S. 193, 197–198; see Note, *Supreme Court Review of State Court Decisions Involving Multiple Questions,* 95 U. of Pa. L. Rev. 764. And where a state court decision is based on an erroneous federal gound, its judgment will be vacated and the cause remanded, notwithstanding that the state court might have based its decision on another ground, not considered and decided by it, which would have been adequate to support the judgment. Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed.), pp. 155–158, 169–170.

In this case, however, presumably because a similar controversy had been here two terms ago in *South* v. *Peters, supra,* the Court apparently

pretermitted the immediate question decided by the Supreme Court of Georgia and went directly to what it deemed the ultimate issue in the case, namely, the merits of the claim of violation of federal constitutional rights. If we are correct in inferring that the Court decided only that such a claim raises political questions which are not justiciable in this Court or any federal court, it would not follow that appellant should be denied the opportunity of arguing to the Supreme Court of Georgia that even though the questions raised are non-justiciable for purposes of federal review, they should nevertheless be considered and decided by a state court whose jurisdiction of a constitutional controversy is not defeated because the issues are political in nature. *Thompson* v. *Talmadge, supra.*

Accordingly, if the Supreme Court of Georgia erred, as we believe, in holding that the Fourteenth and Fifteenth Amendments afford no protection whatsoever to the right of citizens of the United States to vote in a state primary, then, instead of dismissing the appeal—thus leaving the erroneous ruling below as an insuperable barrier against reaching other questions—it would, we submit, be entirely proper and in the public interest for this Court to vacate the judgment below and remand the case so that appellant could seek determination by the Supreme Court of Georgia of the question whether that court, notwithstanding that the case may involve political issues

which are not justiciable in federal courts, should pass upon the validity of the county unit voting system under the Fourteenth and Fifteenth Amendments.

The importance of affording appellant an opportunity to present this question to the Supreme Court of Georgia is clear and substantial. The record warrants no inference that denial of such an opportunity results only in remote or conjectural prejudice to appellant and to others who seek from the state courts, and not from this Court, correction of what they deem so gross an inequality in voting rights as to constitute a discrimination prohibited by the Constitution of the United States.

For the reasons stated, we urge this Court to reconsider its dismissal of the appeal, to vacate the judgment below as resting on an erroneous federal ground, and to remand the case to the Supreme Court of Georgia for consideration of such further questions as may be involved.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

PHILIP ELMAN,
Special Assistant to the Attorney General.

MARCH 1952.

U. S. GOVERNMENT PRINTING OFFICE: 1952